Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. 96-

MICHELLE PRICKETT, BOBBY PRICKETT, AND RITA ROBERTSON, as Administrators of the Estate of Jeffery Prickett, deceased,
Petitioners,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY and DAVID W. STEPHENS,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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March 10, 1997

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APPENDIX A

OCTOBER 11, 1996

SUPREME COURT OF ALABAMA

STATE OF ALABAMA - - JUDICIAL DEPARTMENT
OCTOBER TERM, 1996-97

Case No.: 1940479

Michelle Prickett, et al

v.

Norfolk Southern Railway Company and David W. Stephens
(Calhoun: CV-93-083)

COOK, JUSTICE.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(E), Ala. R. App. P., and CSX Transp., Inc. v. Easterwood, 507 U.S. ____, 113 S. Ct. 1732, 123 L. Ed 387 (1993); and Borden v. CSX Transp., Inc., 843 F. Supp. 1410 (M.D. Ala. 1993).

Hooper, C.J., and Maddox, Almon, Shores, Houston, Kennedy, and Butts, JJ., concur.

APPENDIX B

IN THE SUPREME COURT OF ALABAMA

December 13, 1996

1940479

Michelle Prickett, et al.

v.

Norfolk Southern Railway Company and
David W. Stephens
(Calhoun: CV-93-083)

Notice

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

Cook, J. - Hooper, CJ., Maddox, Almon, Shores, Houston and Kennedy, JJ., concur.

APPENDIX C

IN THE CIRCUIT COURT
OF CALHOUN COUNTY, ALABAMA

Case No. CV 93-083

Michelle Prickett, Bobby Prickett, and Rita Robertson as personal representatives of the Estate of Jeffrey Remarth Prickett, deceased, and individually,

Plaintiffs

Norfolk Southern Railway Company; David M. Stephens, et al.,

Defendants

ORDER AND JUDGMENT

The defendants, Norfolk Southern Railway Company and its engineer, David W. Stephens, timely filed a Motion for Summary Judgment on August 15, 1994, and an accompanying Memorandum on August 18, 1994. A hearing on defendants' Motion for Summary Judgment was held on September 2, 1994. At that hearing,

plaintiffs' attorney requested additional time in which to obtain evidence and to file a brief in response to the defendants' Motion for Summary Judgment. The Court granted plaintiffs up to ten days from the date of the hearing in which to file a brief and thirty days from the date of the hearing in which to submit evidence in opposition to defendants' Motion for Summary Judgment. Plaintiffs subsequently requested a couple of extra days in which to submit a brief. Plaintiffs submitted a brief to the Court on September 16, 1994. The deadline for submitting additional evidence was October 3, 1994. Plaintiffs requested and received additional time in which to take depositions and complete additional discovery. The new deadline was October 28, 1994.

In the additional time for discovery

granted by the Court, plaintiffs took the depositions of Kenneth L. Joiner, Michael L. Shaw, Cecil W. Colson, Jr., Dykes T. Rushing, and E.H. Bentley. The complete transcripts of all five depositions have been filed and considered by the Court.

The Court has given a full and complete examination of all matters raised at the hearing on September 2, 1994, as well as all matters pertinent to and submitted in support of or in opposition to defendants' Motion for Summary Judgment, either before or since the hearing. These essential facts regarding the accident are uncontroverted. The accident occurred at approximately 11:30 a.m., December 28, 1992, at the intersection of DeArmanville Road (County Road 45) and the Norfolk Southern Railway Company Main line in Calhoun County, Alabama The pickup truck

driven by plaintiffs' decedent was southbound and the train was eastbound. There were two standard crossbuck signs, one on each side of the track, and two red and white octagonal "STOP" signs, one on each side of the tracks, at the crossing at the time of the accident. Before reaching the tracks, the Prickett vehicle passed a stop ahead sign, a railroad advance warning sign, and R X R pavement markings. The Prickett vehicle did not stop for the stop sign at the crossing, but instead pulled onto the track without stopping just as the train reached the crossing. The engineer put the train into emergency to stop the train. The train, which was traveling about 40 to 45 mph at the time of the incident, was within the maximum speed of 60 mph permitted by federal regulations.

At the conclusion of that hearing,

based on the undisputed evidence before it, the Court granted the defendants' Motion for Summary Judgment with respect to any claim predicated on negligence or wantonness as to the speed at which the train involved in the accident was operating. This claim is preempted by federal law. The Court also granted defendants' Motion for Summary Judgment as to any claims for compensatory damages arising out of the death of plaintiffs' decedent, as Alabama law does not permit any recovery for compensatory damages in a wrongful death action.

The issues of whether to grant defendants' Motion for Summary Judgment based on plaintiffs' decedent's failing to stop in obedience to the stop sign at the crossing and as to any claim of negligence or wantonness predicated on the adequacy of the traffic control

devices present at the crossing on the date in question was taken under advisement at the conclusion of the hearing on September 2. The plaintiffs submitted a brief in opposition to defendants' Motion for Summary Judgment, and five depositions have now been submitted.

The plaintiffs submitted the affidavits of Nora Fagan and Curtis E. Hill for the purpose of disputing whether the train horn was properly sounded prior to the accident. However, the plaintiffs have not submitted any evidence controverting testimony submitted by defendants that plaintiffs' decedent never stopped for the stop sign at the crossing. Whether the horn was sounded properly is immaterial and irrelevant on this issue. As plaintiffs' decedent was under an obligation under Alabama law to

stop, look and listen in obedience to the stop sign at the crossing, and the undisputed evidence is that he failed to do so, defendants' Motion for Summary Judgment is granted on the basis that no reasonable juror could find that the driver's contributory negligence was not the sole proximate cause of the accident and death here in question. Middaugh v. City of Montgomery, 621 So. 2d 275 (Ala. 1993), and Borden v. CSX Transp., Inc., 843 F. Supp. 1410 (M.D. Ala. 1993).

Based on the photographs presented to the Court, no reasonable juror could find that Prickett would not have been able to detect the approach of the train had he stopped at an appropriate place before attempting to traverse the crossing. Moreover, it is clear that if plaintiff's decedent had looked for a train at a place where he needed to look, there is

nothing which would have kept him from seeing the approaching train. If it is assumed that plaintiffs' decedent did look, he is held to have seen that which was there to be seen.

In the alternative, the Court has also considered the defendants' Motion for Summary Judgment with respect to any claim of negligence or wantonness predicated on the adequacy of the traffic control devices present at the crossing on the date in question. In the opinion of the Court, the evidence is uncontroverted on this issue, and defendants' Motion for Summary Judgment is now granted as to this claim.

In support of their Motion for Summary Judgment, the defendants presented the affidavits of Dykes T. Rushing, E.H. Bentley, Cecil W. Colson, Jr., Kenneth L. Joiner (two affidavits), Michael L. Shaw,

A.T. Hanak, and J.P. Thomas, along with excerpts from the depositions of David W. Stephens (a defendant and the engineer on the train), Johnny Louis Bell (conductor on the train), and Willie L. Bennett (trainman on the train).

In opposition to defendants' Motion for Summary Judgment with respect to the adequacy of the warning devices at the crossing, plaintiffs submitted the depositions of Kenneth L. Joiner, Michael L. Shaw, Cecil W. Colson, Jr., Dykes T. Rushing, and E.H. Bentley.

Rushing is Office Engineer for the Alabama Department of Transportation and is responsible for the oversight of the Alabama State Department of Transportation records of federal aid projects. He is the custodian of those records. Rushing's affidavit and deposition established that there have

been a total of three federal projects at the DeArmanville Road crossing, all of which received the approval and authorization of the Federal Highway Administration prior to the date of the accident in question. He testified that the DeArmanville Road crossing at issue in this case first involved participation (including approval and authorization of the project) by the Federal Highway Administration and utilized federal funds for the improvement of that crossing by the installation of warning devices in 1978 and 1979. A total of $184,680.00 in federal funds was obligated for the installation of warning devices at crossings in that project. He also testified that a second federal project to install warning devices at the crossing involved participation (including approval and authorization of

the project) by the Federal Highway Administration in the installation of warning devices at the crossing. This project involved the obligation of federal funds prior to the accident in the amount of $48,870.00 for the installation of warning devices at crossings, including the DeArmanville Road crossing. Finally, Rushing testified that a third project involving participation (including approval and authorization of the project) by the Federal Highway Administration utilized federal funds for the improvement of the crossing at issue in this case by the installation of active warning devices. The final approval of the Federal Highway Administration for this project, which included installing signals, gates, bell, motion predictor, extra set of signal heads, and chevron sign, and cutting

trees on the west approach to the crossing, was given on October 27, 1992, prior to the accident in question. This project was placed in service on April 26, 1993.

The affidavit deposition of Mr. E.H. Bentley established that companies owned by him held the contracts to perform the work of installing the warning devices at the DeArmanville Road crossing called for by the first Federal Aid Project authenticated by Mr. Rushing's affidavit and that that work was performed and was complete by July 1979, and that federal funds paid for the construction.

The affidavits and deposition of Mr. Kenneth L. Joiner authenticated Federal Aid Rail Highway Crossing Project Agreements and other pertinent documents incident to the same projects covered in Mr. Rushing's affidavit and established

that Calhoun County agreed to maintain the warning devices after installation (except for the maintenance of the flashing lights and gates).

Cecil W. Colson, Jr., is Assistant Multimodal Transportation Engineer for the State of Alabama Department of Transportation. Colson testified that prior to the accident in question, a diagnostic review team comprised of representatives of the State of Alabama Department of Transportation, the railroad, and Calhoun County had evaluated the crossing to determine whether additional signs or signals should be installed. Federal funds paid for the time and expenses of the State Department of Transportation personnel who participated in the diagnostic review. A series of steps followed the diagnostic review and involved the

significant participation of both the State Department of Transportation and the Federal Highway Administration prior to the accident. These steps included, among other things, the preparation of detailed engineering plans for the project. Colson further testified that the Federal Highway Administration gave final approval for the project for the installation of active signals at the crossing on October 27, 1992.

Michael L. Shaw is the County Engineer for Calhoun County. He testified that signs and markings were installed at the crossing with federal funds, that lights and gates were installed at the crossing with federal funds, and that Calhoun County had installed a stop sign, stop ahead sign, pavement markings and stop line at the crossing prior to the accident in question.

A.T. Hanak is the Administrator Grade Crossing Program for Norfolk Southern Corporation and its affiliated and subsidiary railroads, including Norfolk Southern Railway Company. Hanak testified that the railroad received authorization on December 10, 1992, from the State of Alabama Highway Department to proceed with the installation of lights and gates at the crossing. He testified that this project was placed in service on April 26, 1993, and that the costs of the project were paid for with 90% federal funds and 10% local or county funds.

The above described evidence is not disputed.

Based on these undisputed facts, this Court concludes that there is no genuine issue of material fact, that federal funds participated in the installation of

warning devices at the crossing in issue with the approval of the Federal Highway Administration prior to the accident in question, and that the defendants are entitled to a judgment as a matter of law on the plaintiffs' claims seeking to impose liability on the railroad for inadequate warning devices at the crossing. The Court was not presented with any legal authority establishing that under current Alabama law on the facts of this case Norfolk Southern would have had a duty to have had signs or signals at this crossing other or different from those that were present, it being undisputed that standard crossbuck signs and "STOP" signs were in place on both sides of the track at the time of the accident. Nevertheless, assuming without deciding that Alabama law might impose such a duty, this

decision is based on the preemption of such claims on the reasoning set out in and authority of Borden vs. CSX Transportation, 843 F. Supp. 1410 (M.D. Ala. 1993), Armijo vs. Atchison, Topeka & Santa Fe Ry., 19 F. 3d 547 (10th Cir. 1994) and Easterwood vs. CSX Transportation, 507 U.S. ___, 113 S.Ct. 1732, 123 L. Ed. 2d 387 (1993).

Plaintiffs argued that the diagnostic review done after the installation of the passive warning signs and markings under the Federal Aid Projects in 1978 abrogated preemption, or, in the alternative, that preemption did not occur until the actual installation of the flashing lights and gates. There are several answers to this. First, under Easterwood, actual installation is not a requirement. Easterwood requires that federal funds participate in the

installation of either active or passive warning devices with the approval of the Federal Highway Administration in order to establish preemption. The Court finds that this occurred prior to the accident in question with respect to each of the three federal projects mentioned above. Thus, preemption was established at the time of the first project in 1978-79.

Second, preemption arises from the exercise of authority, albeit that the exercise of federal authority is with respect to the first project established by proof of a rather mechanical, but substantively important and complex act, i.e., expenditure of federal funds for the installation of passive warning devices. Once federal authority has occupied the field, this Court can find no authority to support the notion that the authority may diminish, wear out or

disappear with passage of time or change of circumstances.

Third, even if one assumed that preemption could not occur with the installation of passive warning devices, a view which this Court rejects as being contrary to the holding of Easterwood, the participation of the Federal Highway Administration in the project to install active warning devices at the crossing was significant and substantial prior to the accident in question and is a sufficient ground on which to base the doctrine of preemption in this case under the holding of Easterwood.

In accordance with the foregoing, it is hereby ORDERED, ADJUDGED and DECREED by the Court that summary judgment be and the same is hereby entered in favor of the defendants on the claim Of the plaintiffs as to the adequacy of the

signs or signals at the crossing.

It is hereby further ORDERED, ADJUDGED and DECREED that a complete summary judgment is hereby entered in favor of the defendants on all claims of the plaintiffs on the basis that the contributory negligence of the plaintiffs' decedent was the sole proximate cause of the accident and death here in question and that this cause be and the same is hereby dismissed with prejudice. Costs are taxed to the plaintiffs.

DONE and ENTERED this 23rd day of November, 1994.

/s/ Malcolm B. Street, Jr.
Malcolm B. Street, Jr.
Circuit Judge

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

MICHELLE PRICKETT, et al.,
Appellants,

v.

NORFOLK SOUTHERN RAILWAY
COMPANY, et al.,
Appellees

Case No. 1940479

ON APPEAL FROM THE CIRCUIT COURT
OF CALHOUN COUNTY
CV 93-83

BRIEF OF APPELLANTS

Leila H. Watson
300 North 21st Street
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205 328-2200
Appellants' Attorney

ORAL ARGUMENT REQUESTED

[PORTIONS OF APPELLANTS' BRIEF NOT RECOPIED FOR THIS APPENDIX INCLUDE: TABLE OF CONTENTS, TABLE OF AUTHORITIES, STATEMENT OF THE CASE, STATEMENT OF THE FACTS, REQUEST FOR ORAL ARGUMENT.]

ISSUES PRESENTED FOR REVIEW

I. Is the plaintiffs' claim that Norfolk Southern failed to construct and maintain a safe crossing and should have installed signals and gates preempted by federal law?

II. Is the plaintiffs' claim that engineer Stephens was operating the train at an unsafe speed preempted by federal law?

III. Was Jeffrey Prickett's failure to stop contributory negligence that proximately caused this accident?

SUMMARY OF THE ARGUMENT

I. THERE IS NO PREEMPTION OF PLAINTIFFS' STATE LAW CLAIM THAT THE RAILROAD HAS FAILED TO MAINTAIN A SAFE CROSSING.

Preemption of a state law claim occurs when the federal government has chosen to regulate in a defined area to the exclusion of the states in order to attain some national uniformity. In this case, the issue is what will make a grade crossing safe. There will be preemption if the federal government has issued

regulations setting standards for grade crossing safety, and the State has chosen to follow those standards. The Plaintiffs then cannot try to enforce a different standard in their suit. However, the strength of a preemption claim is that the federal regulations have been followed. If the regulations have not been followed, then there can be no preemption.

Title 23, section 646.214, of the Code of Federal Regulations sets out what the federal government has determined will be required protection at certain grade crossings. If the required protection is in place at a grade crossing at the time of an accident, the injured party cannot maintain a suit against the railroad or the State on the grounds that the crossing protection is inadequate. This would destroy the

uniformity of national standards and would override federal decision-making authority. The injured party should not be allowed to maintain suit by claiming, in effect, that the federal standard is not good enough. However, if there is no conformity with the federal regulation, then the regulation cannot be preempting any claim by the injured party. In this case, the Plaintiffs' claims essentially amount to a suit to enforce the federal regulations because they are not claiming that the crossing required any greater protection than that which was required under 23 C.F.R. 646.214.

II. THERE IS NO PREEMPTION OF THE PLAINTIFFS' CLAIM THAT ENGINEER STEPHENS WAS OPERATING THE TRAIN AT AN UNSAFE SPEED.

Before 1989, there was a diagnostic review performed of this crossing in which the railroad was a participant. It

became known to the railroad then that the existing warnings, ie. crossbucks and pavement markings, were inadequate protection and that this crossing required train activated signals and gates to meet federal standards of crossing safety. There had been 13 reported accidents at this crossing before Jeffrey Prickett was killed in December 1992, and before the crossing was brought up to standards. The railroad should not have ignored this knowledge, and should have instituted interim measures until the signals and gates were installed. The railroad should have issued a "slow order" for this crossing and the engineer should have operated at a slower speed to compensate for the inadequate sight distance.

There is a savings clause in the

preemption provision of the Federal Railroad Safety Act, which allows the states to maintain more stringent standards when there are "local safety hazards," such as a crossing that falls below standards. This crossing fell below standards, and all that was required by the railroad as an interim measure to make the crossing safer was reduced speed by the train. This claim is not preempted because it would be an interim measure taken to correct an extremely fatal "local safety hazard."

III. JEFFREY PRICKETT'S FAILURE TO STOP WAS NOT CONTRIBUTORY NEGLIGENCE THAT PROXIMATELY CAUSED HIS DEATH.

Contributory negligence is not a defense to wantonness. There is substantial evidence of wantonness presented by Plaintiffs. Defendants knowingly maintained a very dangerous crossing for a period of years, and on

the date of the accident, the train was operating at a speed that was unreasonable with the present circumstances and failed to sound the train horn.

Additionally, this case, as in most negligence cases, presents a question of fact on matters of contributory negligence and proximate cause. Summary Judgment was inappropriate on these issues.

ARGUMENT

I. PLAINTIFFS' CLAIM THAT DEFENDANTS HAVE MAINTAINED AN UNSAFE CROSSING IS NOT PREEMPTED UNDER 23 C.F.R. 646.214(b)(3) AND CSX TRANSPORTATION V. EASTERWOOD.

A. FEDERAL PREEMPTION: 23 C.F.R. 646.214 (b)(3) AND CSX V. EASTERWOOD

The Federal Railroad Safety Act (hereinafter "FRSA"), codified at 45 U.S.C. 421, et seq., was enacted in 1970

to promote safety in all areas of railroad operations. Of the numerous areas of railroad safety, only one was afforded specific treatment in the FRSA, and that was the area relating to the problem of grade crossing safety, to which a specific section of the Act was devoted. Under 45 U.S.C. 433(a), the Secretary of Transportation was required to study and report to Congress on the problem of protecting grade crossings and to undertake a coordinated effort toward solving the grade crossing problem.

In response to the Secretary's report to Congress on the problems of grade crossings and the possible solutions, Congress amended the Federal Highway Safety Act in 1973. The 1973 Act made federal funds available to the States to improve grade crossings, conditional upon the individual States

conducting and maintaining a survey of all grade crossings, identifying those crossings in need of protective devices, and implementing a schedule of projects to accomplish the same.

To carry out this program with national continuity, the Act authorized the Secretary to promulgate regulations governing the implementation of projects to increase grade crossing safety and installation of warning devices at the crossings involved.

It is these regulations which are at issue here. The FRSA contains an express preemption provision on which the railroads have relied for their argument that the Secretary's regulations preempt the claims of an unsafe crossing. 45 U.S.C. 434. The provision states:

> The Congress declares that laws, rules, regulations, orders and standards relating to railroad

> safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

The issue before this Court now is whether the Secretary's regulations "cover" the Plaintiffs' allegations under Alabama law that the Norfolk Southern failed to maintain the safety of the DeArmanville crossing and should have had signals and/or gates to protect the crossing.

> [T]he issue before the Court is whether the Secretary of Transportation has issued regulations covering the same

> subject matter as [Alabama] negligence law pertaining to the maintenance of, and the operation of trains at, grade crossing. To prevail on the claim that the regulations have preemptive effect, petitioner [railroad] must establish more than that they "touch upon" or "relate to" that subject matter, [cite omitted] for "covering" is a more restrictive term which indicates that preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law.

CSX v. Easterwood, 113 S. Ct. at 1738, 123 L. Ed. 2d at 396-97.

23 C.F.R. 646.214(b) is the regulation passed by the Secretary which Defendants, and railroads generally in Easterwood and its progeny, claim preempts state law.

> (b) Grade Crossing Improvements.
>
> (1) All traffic control devices proposed shall comply with the latest edition of the Manual of Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards.
>
> (2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade

crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA until adequate warning devices for the crossing are installed and functioning properly.

(3)(i) Adequate warning devices, under 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of school buses or trucks carrying hazardous materials, unusually restricted sight distance,

continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of the FHWA.

This regulation dictates the type of warning device that is required at a grade crossing. The regulation will preempt any state law, including common law negligence, dictating the type of warning device to be required at a crossing, assuming the requirements of the regulation are met.

Subsection (b)(1) is not in issue here as Plaintiffs admit that all the traffic control devices were in

compliance as required under the regulation. Likewise, subsection (b)(2) is not in issue because the crossing was not "at or near the terminus of a Federal-aid highway project." Defendants would agree that subsections (b)(3) and (4) are at the heart of this preemption battle.

Under this regulation, if a crossing features any of the conditions listed in subsection (b)(3), any federally funded improvement project must contain gates and signals, unless a diagnostic survey justifies their absence. At crossings that do not have any of the listed (b)(3) features, the type of warning device to be installed with federal funds must be approved by the Federal Highway Administration. 23 C.F.R. 646.214(b)(4).

> States must employ automatic gates with flashing light signals as part of any improvement project that

> concerns a crossing which features, inter alia, multiple tracks, high speed trains operating in areas of limited visibility, heavy vehicle or train traffic, or if a diagnostic team made up of "representatives of the parties of interest in the crossing" recommends them. [FN omitted] For federally funded installations at crossings that do not present the track conditions specified in section 646.214(b)(3), "the type of warning device to be installed, whether the determination is made by a State...agency, and/or the railroad, is subject to the approval of the FHWA." 646.214(b)(4).

CSX v. Easterwood, 113 S. Ct. at 1739, 123 L. Ed. 2d at 398.

See also Heizelman v. Southern Pacific Transportation Company, (USDC Ore. 1993; Copy attached to this brief)("If automatic gates are not appropriate under (b)(3), then a (b)(4) analysis is necessary.).

B. APPLICATION OF THE REGULATION TO THE DEARMANVILLE CROSSING.

The DeArmanville crossing features several of the conditions listed in

subsection (b)(3), and the federally funded projects at the crossing which were completed prior to December 28, 1992, the date of the accident, did not include installation of gates and signals. Consequently, the requirements of the regulation have not been met, and the railroad's reliance on the regulation for preemption of the state law claims, is improper.

The DeArmanville crossing has two main line tracks, or in other words, "multiple main line railroad tracks." 23 C.F.R. 646.214(b)(3)(i)(A). The physical layout of this crossing, particularly when trains approach from the west and highway traffic is traveling south, as was the case in this accident, creates an "unusually restricted sight distance." 23 C.F.R. 646.214(b)(3)(i)(E). Thirteen accidents in the 10 years preceding this

one is sufficient to show "continuing accident occurrences." 23 C.F.R. 646.214(b)(3)(i)(E).

Plaintiffs have presented evidence that the DeArmanville crossing, in 1978/79 and 1991, the dates of Projects 1 and 2, had in existence two or three of the "(b)(3) features." If the railroad wants to rely on the regulation and these two projects to preempt Plaintiffs' claims, they must present evidence that the projects included installation of gates and signals, or that a diagnostic team review justified their absence. This, the railroad has failed to do. Both projects involved only the installation of signs and pavement markings. No signals or gates were installed. There was no diagnostic survey done prior to either project requiring gates and signals or justifying

their absence.

Norfolk Southern, in its Motion for Summary Judgment, relied on a string of decisions that held that the expenditure of federal funds alone is sufficient to invoke preemption under the regulations. The analysis is not that simple; whether federal funds were spent is just the first question that must be answered. The Court must still decide whether the regulation was followed. Were there any (b)(3) features at the crossing? If so, then gates and signals must be installed with the project. If there are no gates or signals at a (b)(3) crossing, was there justification for their absence? This is the analysis that must be made under 23 C.F.R. 646.214 and Easterwood.

> The Secretary was to have the whip hand in specifying safety standards in the railroad industry; the preemption provision itself refers, in a sentence that we did not quote,

> to the goal of achieving so far as possible national uniformity in those standards. So if the Secretary had prescribed cross-bucks for the crossing at which Shots was injured, Shots could not argue that the common law of Indiana required the railroad to install automatic gates and flashing-light signals. The regulation would have covered the subject matter of highway safety at that crossing.

Shots v. CSX Transportation, ___ F. 3d ___ (7th Cir. 1994) [1994 WL 559519].

Although Project 3 did ultimately result in upgrading of the crossing, including installation of signals and gates, it cannot be the basis of application of the regulation because the actual construction of the warnings was not commenced until after this accident, and the equipment was not in service until April 1993. Under CSX v. Easterwood, merely completing a diagnostic survey and engineering diagrams is insufficient.

In Easterwood, the evidence was that

Mr. Easterwood was killed in February 1988, at the Cook Street crossing in Cartersville, Georgia. In 1979/80, the Georgia DOT decided to upgrade the crossings in Cartersville. It installed motion detection devices at five crossings, including the Cook Street crossing. It installed signals and gates at four of these crossings, but not at the Cook Street crossing because Cook Street required the construction of a traffic island, and city approval was required. The city declined to approve the island and the plan for the gate was shelved by the DOT and the funds that had been earmarked for the gates at Cook Street were reallocated for use in a different project. There were no gates at the Cook Street crossing on the date of the accident. The project to place a gate at Cook Street was placed on a list

of projects to be considered at a later time. The railroad claimed that this was a single project to improve the five Cartersville crossings and that federal funds had been actually expended on the project, including work at Cook Street. The Supreme Court held that these facts "do not establish that federal funds 'participated in the installation of the warning devices' at Cook Street." CSX v. Easterwood, 113 S. Ct. at _____, 123 L. Ed. 2d at 401-02.

Under Easterwood, the mere expenditure of funds for engineering costs, without actual expenditure of federal funds for the installation of gates and flashing signals does not meet the requirements of the regulation, and therefore, the regulation does not apply and cannot be relied upon to preempt a state law claim that there should have

been greater protection at a crossing at the time of the accident.

Other courts after Easterwood have reached a similar holding. In Earwood v. Norfolk Southern Railway Company, 845 F. Supp. 880, 886 (N.D. Ga. 1993), the Court held that "preemption is triggered when the signals are installed, not when the first federal dollar participates."

> The presence of adequate warning devices and the speed limits protect the public. The devices, not federal funds, provide the protection. Until the devices themselves are installed, the care exercised by the railroads protects the public.

Earwood v. Norfolk Southern, 845 F. Supp. at 886-87. The Tenth Circuit, in Armijo v. Atchison, Topeka and Santa Fe Railway Company, 27 F. 3d 481 (10th Cir. 1994), remanded the case back to the trial court for a determination whether federal funds had participated "significantly" in the

upgrading of the crossing. The court reasoned that "preemption does not occur until federal funds participate in the installation of warning devices." In Armijo, a diagnostic team had recommended installation of flashing signals and gates, but no construction work had commenced before the accident. The Ohio Supreme Court, in Carpenter v. Consolidated Rail, 69 Ohio St. 3d 259, 631 N.E. 2d 607 (1994), held that "before a state law governing warning devices will be preempted, federal funds must actually have been committed, spent...and the devices must have been installed." It is also worthwhile to note that if 23 C.F.R. 646.214(b)(2) were the applicable subsection, there would be no preemption until "adequate warning devices for the crossing are installed and functioning properly."

In the case at bar, the only evidence before the Court is that there was an expenditure of federal funds for engineering plans for a future installation. The payment for the plans came from the "PE or preliminary engineering fund," which is a general state-wide federal fund that is non-specific for any crossing. (C 807) What protection does the public have if the engineering plans had been drafted in 1989, but no gates or signals installed until 1993? Does this give the railroad immunity to pass over this crossing, identified and known to be inadequately protected, with indifference year after year on the basis of years old plans? NO - the answer was given by the Earwood court that until the gates and signals are installed the care exercised by the railroad protects the public, and when

the railroad breaches that responsibility, it is liable in suit.

The Secretary, by 23 C.F.R. 646.214(b)(3), prescribed that the DeArmanville crossing, because it has double main tracks and limited sight distances, should have signals and gates. This was the case in 1978/79 when Project 1 was carried out, it was the case in 1989 when the diagnostic review was performed of this crossing, it was the case in 1991 when Project 2 was signed, and it was the case on December 28, 1992, when Jeffrey Prickett was struck and killed by the Norfolk Southern train. For nearly 15 years, the Secretary's regulations were not carried out. The Plaintiffs' claims should not be preempted because the railroad now comes forward and says "but we had the plans drafted all this time." Plans are not

the same as working signals and gates at the crossing. Plans, never executed, offer no protection to motorists and trains or increased crossing safety.

Norfolk Southern contended in its Motion for Summary Judgment that because federal funds had been expended at this crossing for improvements that met the requirements of 23 C.F.R. 646.214 (b)(1), the Plaintiffs' subsequent claim that the crossing was unsafe is preempted. Plaintiffs submit again that it is not this simple.

Following the 1973 amendment to the Highway Safety Act, the State, using federal funds, "improved" most crossings in Alabama by installing crossbucks and pavement markings. The 1978/79 project was part of this state-wide program. This type of program was carried out across the country as a result of the

amendment. In Shots v. CSX Transportation, __ F. 3d ___ (7th Cir. 1994) [1994 WL 559519], the evidence was that the State of Indiana used federal funds to install crossbucks at nearly 2,700 crossings. Plaintiffs' Counsel just argued a case in Mississippi where the Mississippi DOT explained that in the early 1980s, the State used federal funds to put pavement markings and crossbucks at 2,000 paved crossings in Mississippi. Crossings with multiple tracks, sight obstructions, heavy highway and rail traffic, and high accident histories, received the same treatment as those with single tracks and clear sight distances. This was also the case with Project 1 in which every crossing in the Fourth Division received crossbucks and pavement markings, regardless of the individual features of each crossing. (C 438)

Were it so simple that the mere expenditure of about $900 of federal funds (C 828, 1027-29) for passive warning devices at every crossing in Alabama, Mississippi, Indiana and probably every other crossing in the country, then preemption becomes immunity for the railroad when it has not spent a dime or been responsible for initiating the program. However, the intent of the Act was to make grade crossings safer, not provide immunity for the railroad. The intent of the Secretary's regulations promulgated pursuant to the Act, was that crossings that present greater hazards would receive greater protection, and that this would put those crossings on equal footing with less busy crossings with better sight distances, in terms of grade crossing safety. This intent cannot be carried out if every crossing,

regardless of features, receives only crossbucks and pavement markings. For this Court to hold that the mere expenditure of federal funds for crossbucks and pavement markings preempts the Plaintiffs' claim, requires the Court to ignore application of the Act and regulations. And, if the Act and regulations do not apply to this crossing, then there should be no preemption.

One last point in this argument bears mentioning. Norfolk Southern claims that it is forbidden under Alabama law from erecting at its crossings any more than a crossbuck sign and that therefore, it has no common law duty to provide greater protection at more dangerous crossings. (C 290-92) It cites a criminal statute as support for its claim. This statute was intended to

punish people who erect signs that would create a dangerous condition, like pranksters that would put up increased speed limit signs or detour signs. It could not have been the intent of the Legislature to prevent the railroad from correcting a hazardous condition.

The railroad also cites the Alabama Manual of Uniform Traffic Control Devices, for support that unauthorized signs and signals are prohibited. There is nothing stopping the railroad from doing what many municipalities and counties have had to do, and seek permission from the State Highway Department for authorization to erect signs, or for the Highway Department to do so itself. The railroad cannot have intimate knowledge that one of its crossings is so hazardous and still claim that there was nothing it could do to

change this situation. The railroad can be sued for maintaining such a hazardous crossing and failing to do anything to make it safer. Louisville & Nashville Railroad Company v. Williams, 370 F. 2d 839, 842 (5th Cir. 1966).

II. PLAINTIFFS' CLAIM THAT STEPHENS WAS EXCEEDING A SAFE AND REASONABLE SPEED IS NOT PREEMPTED UNDER THE FEDERAL RAILROAD SAFETY ACT.

The speed limit for this train on December 28, 1992, was 60 mph. The train was actually traveling at about 44 mph at the time of the accident. In CSX Transportation v. Easterwood, supra, the Supreme Court held that a claim of excessive speed, not in violation of the federally set speed limit of 60 mph, would be preempted. The Supreme Court did reference the savings clause of the preemption provision of the FRSA which says "a State may adopt...a more

stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard." 45 U.S.C. 434.

There have been several decisions since Easterwood which have examined the term "local safety hazard." Earwood v. Norfolk Southern Railway Company, 845 F. Supp. 880 (N.D. Ga. 1993) held that "local safety hazard" did not include conditions covered by 646.214(b)(3), such as multiple tracks and inadequate sight distance. However, Missouri Pacific Railway Company v. Lemon, 861 S.W. 2d 501 (Tex. App. 1993), held exactly the opposite. In that case the engineer was familiar with the crossing and knew that there was a sight obstruction and multiple tracks. The Court held that "his failure to slow the train under

these conditions is evidence he was operating his train at an excessive rate of speed and is a claim that is not preempted by federal law." Missouri Pacific v. Lemon, 861 S.W. 2d at 510.

The gist of the Plaintiffs claim in the case at bar is that this was a crossing that needed signals and gates, that it had been identified by and to the railroad in the diagnostic review before 1989 that the crossing needed signals and gates, and nothing was done until April 1993. Once this assessment was made and the crossing was identified as failing to meet the federal regulations for grade crossing safety, the railroad could not ignore this determination and walk away from its common law duty to maintain a safe crossing. If there were no plans to immediately institute the project to make

the crossing safe by installation of the warning devices, the railroad, under its common law responsibilities, should have instituted interim measures to maintain a safe crossing. One of the ways the crossing could be made safer would be to slow the train speeds. The railroad should have issued a "slow order," and the engineer should have operated the train at a slower speed because of the multiple main line tracks and unusually restricted sight distance. Until gates and signals are actually installed, the public that uses the crossing is protected only by the railroad's exercise of reasonable care at the crossing. Earwood v. Norfolk Southern Railway Company, 845 F. Supp. 880, 886-87 (N.D. Ga. 1993).

III. JEFFREY PRICKETT'S FAILURE TO STOP AT THE STOP SIGN WAS NOT CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW, NOR WAS IT THE PROXIMATE CAUSE OF THIS ACCIDENT.

A. CONTRIBUTORY NEGLIGENCE IS NOT A DEFENSE TO PLAINTIFFS' CLAIMS OF WANTON CONDUCT BY NORFOLK SOUTHERN AND ENGINEER STEPHENS.

If there was a crossing in Alabama which was more dangerous than this one on December 28, 1992, Plaintiffs are not aware of it. Plaintiffs have presented evidence that on the date of the accident, the crossing did not meet federal standards for grade crossing safety, that the railroad had been aware of this failure at least since the diagnostic review performed in 1989, that there had been 13 motor vehicle/train accidents at this crossing since 1984, that even after learning these facts the railroad did not take any interim measures to make the crossing safer, that

the Norfolk Southern was requested by the Calhoun County Commission to blow more than the required amount of whistle at this crossing (C 1314), that even after this request and on the occasion of this accident Engineer Stephens did not blow the train horn as required by law or as necessitated by the circumstances (C 532-33), that Engineer Stephens was familiar with this crossing and had operated trains over it many, many times (C 124), and that even with his knowledge of the facts and circumstances surrounding this crossing, and after seeing two trucks approaching the crossing, Engineer Stephens did not slow or blow his whistle. This is sufficient evidence of wantonness to submit those claims to the jury, and if wantonness is found by the jury, then contributory negligence is not a defense as a matter of law.

In Burlington Northern Railway Company v. Whitt, 575 So. 2d 1011, 1021 (Ala. 1990), the Court held that there was evidence of wantonness when the train approached the crossing at a speed in excess of its company rules, the engineer was familiar with the crossing and did not blow the whistle or brake until shortly before impact, and the electric signals were not working. This Court has also found that there was evidence of wantonness when the train did not have on lights, blow its whistle or apply brakes until after impact, and signals were not working. Hamme v. CSX Transportation, 621 So. 2d 281 Ala. 1993).

> While we recognize a continuing duty on the part of a person intending to cross railroad tracks to stop, look, and listen for approaching trains, if there is substantial evidence that the railroad failed to use all reasonable means to warn the approaching driver of his danger, after the railroad discovered the

> approaching driver's peril, ...then the question of wantonness if for the jury.

Hamme, 621 So. 2d at 283-84.

B. THERE IS DISPUTED EVIDENCE OF CONTRIBUTORY NEGLIGENCE PROXIMATELY CAUSING THIS ACCIDENT.

Jeffrey Prickett was not speeding, he slowed his pickup truck to about 15 mph for the crossing, there was no train whistle warning him of the train's approach, and he probably did not have sight of the train approaching from behind him. Section 32-5A-150 of the Code of Alabama states:

> Whenever any person driving a vehicle approaches a railroad grade crossing under any of the circumstances stated in this section, the driver of such vehicle shall stop within 50 feet but not less than 15 feet from the nearest rail of such railroad, and shall not proceed until he can do so safely. The foregoing requirements shall apply when:
>
> 1) A clearly visible electric or mechanical signal device

> gives warning of the immediate approach of a railroad train;
> 2) A crossing gate is lowered or when a human flagman gives or continues to give a signal of the approach or passage of a railroad train;
> 3) A railroad train approaching within approximately 1,500 feet of the highway crossing emits a signal audible from such distance and such railroad train, by reason of its speed or nearness to such crossing, is an immediate hazard;
> 4) An approaching railroad train is plainly visible and is in hazardous proximity to such crossing.

The law of Alabama is not that there is an absolute duty to stop, look and listen whenever a driver comes upon a railroad track; it is the law that if a driver approaches a track and has notice that a train is approaching at that time, then he has a duty to stop, look and listen before proceeding.

The Eleventh Circuit, interpreting Alabama law in Stallworth v. Illinois

Central Gulf Railroad, 690 F. 2d 858 (11th Cir. 1982), explained the rule this way:

> We hold that Alabama does not impose an absolute duty to stop, look and listen...
>
> ...
>
> ...As we have said, we do not think that it can justly be affirmed, as a matter of law, that there is a duty to stop in all cases, but we do think that the duty exists in cases where there is an obstruction to sight or hearing, and that where the surroundings are such that but one conclusion can be reasonably drawn - and that conclusion is that it is negligence to proceed without halting - the court should without hesitation direct a verdict, if no halt is made. In the majority of cases, however, the question is one of fact, or a mixed question of law and fact, rather than a pure question of law...
>
> ...The general rule is that a motorist has a duty to stop, look and listen before crossing a railroad track. An exception arises when the evidence is such that some peculiar environment or hazardous condition made the failure to stop not negligent...
>
> ...The exception acknowledged in Lambeth, and illustrated in Callaway, 40 So. 2d 73; Johnston, 199 So. 2d 840; and McCullough, 396

> So. 2d 683, arises when some peculiar environment or hazardous condition confronts the driver. The unusual topography in Callaway, the distracting trees and foliage in Johnson, and the disputed failure of the automatic signal device in McCullough brought the issue of the driver's negligence within the province of the jury.

In this case, because the train did not blow its whistle and was not plainly visible to Jeffrey Prickett, he did not have a duty to stop, look and listen.

Plaintiffs would also submit to this Court that it knows what everyone else knows, and that is that motorists do not stop for railroad tracks, even if there is a stop sign at the tracks. To do merely what other prudent persons do without injury, and what he himself has done on other occasions without injury, is not contributory negligence. Johnson v. Niagara Machinery and Tool Works, 555 So. 2d 88, 94 (Ala. 1989). To prove

contributory negligence as a matter of law, Defendants must show that Jeffrey Prickett knew of the approaching train, appreciated the danger of the circumstances at the moment the incident occurred and placed himself in danger's way. Burlington Northern v. Whitt, 575 So. 2d at 1021. If Jeff Prickett was only "heedless" of the approaching train, this does not rise to the level of contributory negligence. Johnson v. Niagara Machinery, 555 So. 2d at 94.

The issue of contributory negligence in this case, as in most negligence cases, is a jury question and it was inappropriate for the Circuit Court to have granted summary judgment on this basis.

CONCLUSION

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Appellants respectfully

requests this Honorable Court to reverse the judgment and remand the cause.

/s/ Leila H. Watson

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

MICHELLE PRICKETT, et al.,
Appellants,

VS.

NORFOLK SOUTHERN RAILWAY
COMPANY, et al.,
Appellees.

CASE NO. 1940479

APPELLANTS' REQUEST FOR ADDITIONAL
FACTS PURSUANT TO A.R.A.P. RULE 39(k)
and
APPLICATION FOR REHEARING

Leila H. Watson
David Cromwell Johnson
Attorneys for Appellants

[ONLY THE APPELLANTS' REQUEST FOR ADDITIONAL FACTS IS INCLUDED; THE APPLICATION FOR REHEARING IS NOT RECOPIED FOR THIS APPENDIX.]

APPELLANT'S REQUEST FOR ADDITIONAL FACTS PURSUANT TO A.R.A.P. RULE 39(k)

Appellant requests that the Court rehear this case, and include the following facts in its opinion:

1. Jeffrey Prickett was killed when his pickup truck was struck by a Norfolk Southern train at the DeArmanville crossing in Calhoun County. The accident occurred on December 28, 1992.

2. Jeffrey Prickett was driving a red pickup truck south on County Highway 45. As he approaches the DeArmanville crossing, the highway is at an acute angle to the tracks, almost parallel, and then immediately before the crossing, the road makes a sharp right turn and intersects the crossing at a 90 degree angle. (See map; C 480, 535) An eastbound train, like the one involved in

this accident, approaches the crossing from behind southbound highway traffic, or over the right shoulder of a motorist. Mr. Prickett was following a white truck on the highway which crossed the railroad tracks in front of him. Engineer Stephens saw the trucks approaching the crossing when the train was about 500 feet from the crossing. (C 128) Mr. Prickett appeared to be going about 15 mph and Engineer Stephens thought he was going to stop for the crossing. (C 132) When he realized the Prickett truck was not stopping, the train was about 50 feet from the crossing. (C 132) The truck was struck on the passenger side.

Engineer Stephens was operating his train at about 44 mph, eastbound from Birmingham. (C 125, 128) He claims that he started blowing his train horn more than one-quarter mile from the

DeArmanville crossing. (C 127, 135) This testimony is disputed by two people who were in the immediate vicinity of the crossing, who testified that they did not hear a whistle prior to the impact between the train and Jeffrey Prickett's red truck. (C 532-33)

3. Jeffrey Prickett's accident was the 14th accident since 1984, and the ninth since 1988. (C 786-99) The reported accidents were on:

July 7, 1984
September 24, 1985
December 12, 1985
February 1, 1987
January 14, 1988
February 4, 1989
March 17, 1990
April 12, 1990
July 8, 1990
May 25, 1991
September 28, 1991
June 26, 1992
August 13, 1992
December 28, 1992 (Prickett accident)

4. There have been three federal aid projects to upgrade the DeArmanville

crossing.

Project 1: Project Number RRP-000S(12) was completed in 1978/79, and involved the installation of two "no passing zone" signs and two "R X R" pavement markings. (C 172) Federal funds were used to pay for these improvements. (C 422) There was no diagnostic review performed prior to approval of this project by the Federal Highway Administration.

Project 2: Project Number RRP-000S(266) involved the installation of the stop signs and repainting the "R X R" pavement markings and centerline striping on the roadway. (C 259) The project was completed after this accident. (C 593) It is unclear whether the work was completed as a separate project, or as phase one of the project to install flashing signals and gates (Project 3).

(C 1099-1100) Federal funds were used to pay for these improvements. (C 444)

Project 3: Project Number RRP-000S(285) involved the installation of signals, gates, a bell, motion predictor, chevron signs and tree cutting. The construction was completed and the signals were in service in April 1993. Federal funds were used to pay for these improvements. (C 462) A diagnostic review was conducted prior to this project.

The chronology of events pertaining to the three projects is as follows:

4/28/78 Federal Highway Administration (FHWA) approves Project 1 (C 422)

5/18/79 Project 1 is completed. (C 171-72, 1002)

8/7/89 Prior to this date a diagnostic review of the crossing was performed. (C 679, 691) This is the only diagnostic review ever done of this crossing. (C 1077) Following the diagnostic

review, the State sought inclusion of the crossing in the "Rail-Highway Safety Program." (C 740-42) On this date the FHWA gave approval to include the crossing in the Safety Program. (C 679, 779)

5/21/91 Plans for Project 3 are started. These plans include signals, gates, a bell, motion predictor, chevron signs and tree cutting. (C 769)

11/4/91 FHWA approves Project 2. (C 444)

11/13/91 Calhoun County installs stop signs, stop ahead signs, pavement markings and stop bars at the crossing. This is not a federal aid project. (C 1088-89)

6/26/92 Detailed engineering plans for Project 3 are completed. (C 208-22)

10/27/92 This is the "Effective date of authorization" by the FHWA for Project 3. (C 462) The authorization itself was not signed by the FHWA until 12/29/92.

12/28/92 Jeffrey Prickett's accident.

12/29/92 FHWA signs the authorization for Project 3. The effective date of the authorization is back-dated to 10/27/92.

1/8/93 Norfolk Southern orders the material for Project 3. (C 488, 492)

3/24/93 The material for Project 3 is shipped. (C 488, 492)

4/26/93 Project 3 is completed and the improvements are put in service. (C 488)

5. The DeArmanville Crossing has a double main line railroad track, and is protected by crossbucks and a stop sign on either side, and "R X R" pavement markings. The track runs east-west, and on the occasion of the accident, the train was eastbound. County Highway 45 has two lanes. On the north side of the crossing, which is the approach taken by Jeffrey Prickett, the highway approaches the tracks at a very acute angle, and just before the grade crossing, turns into the crossing at a 90 degree angle. (Diagrams at C 480, 535) In this configuration, if highway traffic is

slowing for the crossing, an eastbound train would approach from behind the highway user.